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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 606

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA, ET AL.,

Appellees.

BRIEF FOR APPELLANTS.

SILAS H. STRAWN,
RALPH M. SHAW,
E. A. BOYD,
P. F. GAULT,
WALTER MCFARLAND,
J. N. DAVIS,
WALLACE HUGHES,
D. P. CONNELL,
JAMES STILLWELL,
L. H. STRASSER,
FRANK H. TOWNER,
Solicitors for Appellants.

THE DARNELL-WAGNER PRINTING COMPANY, 310 WEST MONROE, CHICAGO

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Appellants,

vs.

UNITED STATES OF AMERICA, ET AL.,

Appellees.

BRIEF OF APPELLANTS.

MAY IT PLEASE THE COURT:

This case comes to this Court on direct appeal from a final decree of the District Court for the Southern District of New York dismissing the petition of appellants. The action is one by appellants to set aside an order of the Interstate Commerce Commission (hereinafter called the Commission), in which order appellants and the other defendants before the Commission were required to cease and desist from the practice of collecting, on certain shipments of live stock consigned to the Hygrade Food Products Corporation at the Union Stock Yard in Chicago, Illinois, the yardage charges provided for by tariffs of the Union Stock Yard & Transit Company of Chicago, (hereinafter called the Yards Company) filed with the Secretary of Agriculture.

The appellees are the United States of America, the Commission and the Hygrade Food Products Corporation (hereinafter called the Hygrade Company). The Hygrade Company was the complainant in the proceeding before the Commission. A separate appeal, numbered 607, has been perfected by the Yards Company which was also a defendant in the proceedings before the Commission.

1. Reference to Official Report of Opinion of Lower Court and to Report and Order of the Interstate Commerce Commission.

The opinion of the lower court in this case is officially reported at 8 Fed. Supp. 825, and appears in the printed record at pages 54 to 61, inclusive. The lower court made no findings of fact and stated no conclusions of law additional to those contained in its opinion. The case before the Commission was entitled as *Hygrade Food Products Corporation* v. *Atchison Topeka and Santa Fe Railway Company, et al.*, Docket No. 24375. The report of the Commission therein was made on July 25, 1933, is reported at 195 I. C. C. 553, and appears in the printed record at pages 24 to 37. The order attacked herein was made on July 2, 1934, and is not officially reported, but appears at pages 37 and 38 of the printed record.

2. Statement of the Case.

The proceeding before the Commission was initiated by the filing with the Commission by the Hygrade Company, on March 23, 1931, of a complaint naming appellants, the Yards Company and various other companies as defendants (R. 16). Subsequently, an amendment to this complaint was filed by the Hygrade Company (R. 22). The complaint and amendment thereto, after alleging the ownership and operation by the Hygrade Company of a packing house on

the Chicago Junction Railway adjacent to the Union Stock Yard in Chicago, Illinois, further alleged that the Hygrade Company was entitled to the delivery of livestock shipments at that plant on the Chicago rate, plus $2.70 or $1.35 a car, but that such deliveries had been refused; that if any higher rates applied, they were unreasonable and unjustly discriminatory against and unduly prejudicial of complainant.

With respect to such shipments delivered to the Hygrade Company through the stockyard, it was alleged that certain yardage charges collected thereon were inapplicable, not being filed with the Commission; that the services for which such charges were collected were transportation services which defendants were obliged to furnish under Section 15 (5) of the Interstate Commerce Act, and that the yardage charges were not legally collectible from the complainant. Reparation was also asked.

The defendants before the Commission filed answers to this complaint and the case was thereafter heard by the Commission. The facts developed were that the Yards Company was organized in 1865 under a special charter of the State of Illinois, for the purpose, among other things, of building and operating a stockyard and a railroad. Under this authority, the company built a stockyard in Chicago and a railroad which subsequently became known as the Chicago Junction Railroad. The capital stock of the Yards Company was then $1,000,000, of which amount $925,000 had been subscribed by nine trunk line railroads reaching Chicago. These nine railroads subsequently disposed of their stock and for more than fifty years prior to the hearing, no trunk line railroad had any ownership interest in the Yards Company nor any control over its affairs (R. 147). A complete history of its inception, growth, methods of business and operation is contained in the decisions in *United States* v. *Union Stock*

Yard & Transit Company, 226 U. S. 286; *Chicago Live Stock Exchange* v. *Carriers*, 52 I. C. C. 209, and 58 I. C. C. 164; the *Chicago Junction Case*, 71 I. C. C. 631 and *Adams* v. *Mills*, 286 U. S. 397.

When the Yards Company started business in 1867, it established charges known as yardage charges which it collected on all animals which were handled by it or upon its property (R. 162) and also established separate charges for the service of loading and unloading at its platforms all live stock shipped to or from the stockyard by railroad (R. 148). The yardage charges vary, depending on the kind of animal handled (Ex. 23, certified to this Court; R. 152). From the time they were established, the Yards Company has collected its yardage charges from the shippers or consignees of live stock at the stockyard (R. 151), and has collected its loading and unloading charges from the railroads (R. 149). These two charges have always furnished the largest part of the income of the Yards Company.

From the time these charges were established up to the time of the decision of this Court in *United States* v. *Union Stock Yard & Transit Company*, 226 U. S. 286, the Yards Company had never filed any of its charges in tariffs with any regulatory body (R. 148). At the time of that decision, the railroad properties owned by the Yards Company were being operated by the Chicago Junction Railway Company (R. 147). All of the capital stock of the Yards Company and of the Railway Company was then owned by a New Jersey holding company, and principally because of this circumstance, this Court held that the Yards Company was to some extent a common carrier in interstate commerce and thus subject to the prohibitions of the Act to Regulate Commerce. Subsequent to this decision, the Yards Company filed with the Commission tariffs containing its charges for loading and unloading live stock (R.

148). When these tariffs were filed, the Chicago railroads hauling live stock to and from the stockyard amended their tariffs to provide for the absorption and payment by them of such charges for loading and unloading.

In May, 1917, the Yards Company increased its loading and unloading charges by 25 cents per car (R. 148). The railroads declined to absorb this additional charge and the amount of the increase was thereupon collected by the Yards Company from the shippers and consignees of the livestock. This practice was attacked before the Commission in *Chicago Live Stock Exchange* v. *Carriers,* 52 I. C. C. 209, the Commission holding that the obligation to load and unload livestock at the stockyard rested upon the shipper or consignee and that there was no obligation upon the railroads to assume that burden.

On March 1, 1920, there became effective paragraph (5) of Section 15 of the Act to Regulate Commerce (U. S. C. A. Title 49, Sec. 1 to 15a, p. 426), which reads as follows:

> "Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipment into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee, or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary live stock, or the duty of performing service as to shipments other than those to or from public stockyards."

Presumably because of this amendment to the law, the Commission, at 58 I. C. C. 164, a rehearing of the com-

plaint made by the Chicago Live Stock Exchange, reversed its decision at 52 I. C. C. 209 and held that the obligation to unload livestock at the Chicago yards rested upon the carriers. Although there had been some changes in the form of the lease of the railway properties from the Yards Company to the Chicago Junction Railway Company at the time these decisions were made, the Commission, nevertheless, held that the Yards Company was still a common carrier and subject to its jurisdiction.

The awards of reparation made by the Commission in the *Chicago Live Stock Exchange Cases* were contested by the Yards Company and the railroads, but were finally upheld by this Court in *Adams* v. *Mills*, 286 U. S. 397. In the meantime the railroads, pursuant to the requirements of Section 15 (5) of the Act to Regulate Commerce, had provided for the absorption and payment by them of the increased loading and unloading charges of the Yards Company filed with the Commission, and this absorption and payment has been made by the railroads ever since.

In 1921, the Packers and Stockyards Act (U. S. C. A. Title 7, Sec. 226) became effective. The stockyard of the Yards Company was posted as a public stockyard under that Act (R. 151), and it published its yardage charges in tariffs filed with the Secretary of Agriculture (R. 152). Since that date those yardage charges have remained on file with the Secretary in such tariffs and at the time of the hearings had before the Commission in the case at bar were under investigation by him (R. 152).

In 1922, the railroad of the Yards Company, operated by the Chicago Junction Railway, was leased to the Chicago River & Indiana Railroad Company for 99 years, with an option to purchase, and the stock of the latter company was purchased by the New York Central Railroad Company, all this being done under authority of the Commission granted in the *Chicago Junction Case*, 71 I. C. C.

631 (R. 148). The New York Central now operates the properties formerly operated by the Chicago Junction and Chicago River & Indiana.

Since this arrangement became effective, the Yards Company has had no direct or indirect connection with any company engaged in the operation of a railroad. Its stock and that of the Chicago Junction Railway Company is still largely held by a New Jersey holding company, and the Yards Company still owns the railroad properties formerly operated by the Chicago Junction Railway Company, but neither the Yards Company, the Chicago Junction Railway Company nor the holding company are engaged in supplying any form of transportation, directly or indirectly, nor have any of those companies any interest, direct or indirect, in any company supplying such transportation. (R. 148).

The operations of the Yards Company have been so successful that its stockyard is now the largest in the world (R. 153). In 1930 it furnished a market for more than 14,000,000 animals (R. 149). Its pens, viaducts and other buildings occupy a large area, and it furnishes all necessary facilities for shipping, receiving, buying, selling, weighing, feeding and otherwise caring for livestock of all descriptions (R. 148, 152). All the large packing companies and numerous smaller ones have plants located immediately adjacent to the stockyard, and while they receive, through the stockyard, some livestock which is consigned to them directly as consignee, they secure most of the livestock used by them by purchases at the stockyard (R. 126). The Hygrade Company operates one of those plants which it acquired some years ago (R. 119). Its plant is immediately north of and separated from the stockyard property by the tracks of the Chicago Junction Railway and the proposed extension of Pershing Road (R. 99).

No trunk line serves the stockyard with its own rails.

Livestock brought into Chicago by appellants is hauled by them with their own power over the line of the Chicago Junction, the only railroad serving the stockyard and the plant of the Hygrade Company (R. 162). The methods followed by appellants in delivering livestock at the stockyard are described in the report made by the Commision herein (R. 29).

Many packing companies having plants adjacent to or adjoining the stockyard, including the Hygrade Company, buy animals in the country and have these animals shipped direct to them, as consignees, at the stockyard where their plants are located. Some of such shipments are turned over at the unloading pens or chutes, immediately after unloading, to representatives of such consignees and are then driven through the tunnels and over the viaducts and other property of the Yards Company to the consignees' plants, sometimes being weighed before being removed from the stockyard (R. 107, 108). Shipments consigned to the Hygrade Company which are delivered in this fashion are removed by it from the stockyard to the Hygrade plant by being driven over a viaduct which belongs to the Yards Company and is built from the property of the Yards Company over the tracks of the Chicago Junction Railway to the property of the Hygrade Company (R. 120, 121).

In cases where shipments consigned to the Hygrade Company are not turned over to representatives of that company at the unloading pens, they are removed by employes of the Yards Company into holding pens and are subsequently taken from these holding pens by the Hygrade Company, at its convenience, and removed to the property of the Hygrade Company over the same viaduct (R. 120). In all cases, however, shipments consigned to the Hygrade Company at the stockyard are removed from the property of the Yards Company by the use of the viaduct, whether taken directly from the unloading pens or subsequently

from the holding pens. The yardage charges of the Yards Company, contained in tariffs filed with the Secretary of Agriculture (Ex. 23, certified to this Court), are assessed by it upon all livestock unloaded by it at the stockyard, without regard to whether the animals are delivered at the unloading pens or chutes to the consignee or are put into holding pens and thereafter removed by the consignee (R. 103, 152).

The rates on livestock to various deliveries in Chicago are made up in various ways. Each appellant publishes the Chicago rate on livestock to facilities located on its own rails in the Chicago Switching district, at which facilities the stock will be delivered to the consignees without any charge additional to the Chicago rate (R. 178, 180). Deliveries at these facilities are seldom required by shippers, due to the fact that they are located some distance from the stockyard, where the livestock market and the plants of the packing companies are maintained. If deliveries were made at such facilities, the animals would have to be transported by truck, or otherwise, to the stockyard, either for sale or for delivery to the packing companies whose plants are all in the stockyard district.

On livestock consigned to the stockyard, appellants' tariffs provide that deliveries will be made to industries, chutes and sidings of the Yards Company for the Chicago rate, plus $2.70 per car on shipments handled by western lines and $1.35 a car on shipments handled by eastern lines (R. 178). By further provision in the same tariff, appellants absorb and pay the loading and unloading charges of the Yards Company (R. 179). Thus, the tariff engagement of appellants, on livestock consigned to the stockyard, is to deliver the animals into the unloading pens or chutes in consideration of the charges specified.

On deliveries of livestock consigned to the plant of the Hygrade Company, or any other industry on the Chicago

Junction Railway in Chicago, the tariffs of appellants provide for the application of the Chicago rate, plus the switching charge of the Chicago Junction Railway. That switching charge amounts to 2 cents per 100 pounds on a minimum weight of 60,000 pounds, so that on such deliveries, the minimum charge of each appellant would be the Chicago rate plus $12 per car (R. 179, 180).

In its report herein, five members of the Commission held (R. 26) that complainant's contention that the Chicago rate, plus $2.70 or $1.35 per car, applied to deliveries made direct to complainant's plant was without merit, and that on such shipments the Chicago rate, plus the minimum switching charge of $12 per car, was applicable. The same Commissioners further held (R. 27, 31) that this charge for such deliveries was not unreasonable, and that there was no discrimination against or prejudice of the Hygrade Company as alleged in its complaint to the Commission.

With respect to shipments consigned to the Hygrade Company at the stockyard, it was said (R. 31) that there are no services performed after unloading for which defendants may assess charges, in instances where delivery is taken at the unloading pens; and that livestock, in carloads, consigned to the Hygrade Company at the stockyards, was not and is not subject to yardage charges in instances where delivery was or is taken at the unloading pens (R. 31). With respect to all other shipments consigned to the Hygrade Company at the stockyard, it was held (R. 29) that a charge for yardage after the consignee has not taken advantage of any reasonable opportunity to obtain prompt delivery is not a violation of the Interstate Commerce Act, and that if placement into holding pens is desired, an extra charge therefor is not prohibited by Section 15 of the Act (R. 31).

Commissioner Eastman, while concurring in the report, stated his belief that it did not go far enough, since the un-

loading pens did not seem to him to permit a reasonable opportunity to accept and remove the livestock after notice of arrival (R. 31, 32). Five Commissioners dissented (R. 32, *et seq.*) from the conclusion of the majority that yardage charges could not be assessed on such shipments as were turned over to consignees at the unloading pens and immediately thereafter removed from the stockyard without being placed in holding pens, stating their belief that under Section 15 (5) of the Interstate Commerce Act, the interstate transportation of livestock to public stockyards terminates when such shipments are placed in suitable unloading pens at such stockyard; that the yardage charges, the collection of which was found to be improper by the majority, were within the jurisdiction of the Secretary of Agriculture and not within the jurisdiction of the Commission, and that the complaint should be dismissed.

After the issuance of the Commission's report, the defendants in the proceeding before the Commission filed a petition for reconsideration and reargument. On July 2, 1934, the Commission entered the order assailed in this case (R. 37, 38), denying the petition for reconsideration and reargument theretofore filed, and ordering the defendants, including appellants:

> "to cease and desist, on or before September 20, 1934, and thereafter to abstain from the practices described in the aforesaid report which subject complainant (the Hygrade Company) to payment of yardage charges on livestock, in carloads, consigned to complainant at Union Stock Yards, Chicago, in instances where delivery is taken at the unloading pens provided for such purposes."

Thereafter, on September 10, 1934, the Commission entered a further order postponing the effective date of its order of July 2, 1934, from September 20, 1934 to November 5, 1934

3. Proceedings in the Lower Court.

The original petition in this case was filed in the District Court for the Southern District of New York on August 14, 1934, the suit being started pursuant to the provisions of the Urgent Deficiency Appropriations Act of October 22, 1913 (U. S. C. A., Title 28, Sec. 170, pp. 652, 653, 656). The petitioners named in that petition were the appellants herein and the Yards Company. The defendants were the United States and the Commission.

Before answers were filed, the Yards Company elected to file another petition for rehearing with the Commission and be dismissed as a petitioner in the court proceeding. An order dismissing it as a petitioner in court was accordingly entered; whereupon appellants filed an amended petition (R. 3, *et seq.*) naming the same defendants.

The amended petition, after setting out the facts, alleges that the order made by the Commission on July 2, 1934 is invalid because of its indefiniteness and uncertainty and lack of necessary findings; that if the Commission intended to and did hold that the interstate transportation of livestock in carloads, consigned to the Hygrade Company at the stockyard, did not terminate when such livestock was placed in suitable pens, the Commission erred in law, there being no obligation upon petitioners to do more under the law than place such livestock into suitable pens at the stockyard; also that if such was the holding of the Commission, the order is void as requiring appellants to furnish at a station on a line of railroad not operated by them, services and facilities which they are not required by the law to furnish.

It is further alleged that the order is void since the Yards Company was not, at the time of the making of said order, a common carrier subject to the jurisdiction of the Commission; that if by its report and order the Commission

intended to and did hold that petitioners should pay to the Yards Company the yardage charges, the collection of which from the Hygrade Company is prohibited, the order is void as requiring the payment by appellants of charges for services performed by the Yards Company over which charges and services appellants have no jurisdiction or control, the services being performed after the interstate transportation of the livestock has terminated; is void as requiring a reduction in the rates charged by appellants for the interstate transportation of livestock, there being no evidence in the record to support such a requirement; and is void for the reason that such charges are not within the jurisdiction of the Commission but are within the jurisdiction of the Secretary of Agriculture.

The defendants filed answers to the amended petition generally alleging the validity of the Commission's order (R. 38, *et seq.*; 42, *et seq.*). Prior to the hearing in the lower court the Yards Company intervened (R. 47), its second petition to the Commission for rehearing having been denied. The Hygrade Company also intervened as a defendant (R. 48) and filed an answer generally alleging the validity of the Commission's order (R. 50 *et seq.*). A final hearing in the case was had in the lower court on October 2, 1934 (R. 95), upon which hearing the entire record made before the Commission was introduced in evidence as Petitioners' Exhibit 1 (R. 96). After hearing, the lower court filed its opinion (R. 54 *et seq.*) on October 30, 1934, upholding the Commission's order in all respects, and on November 2, 1934, entered a final decree (R. 61) dismissing appellants' petition for want of equity.

On the same day, appellants' petition for appeal (R. 63), assignment of errors (R. 64), and motion for a stay of the Commission's order pending appeal were presented (R. 66), and an order was entered (R. 70) granting the appeal upon the filing by appellants of a cost bond in the amount

of $250. This bond was approved and filed November 23, 1934 (R. 71). On November 13, 1934, the lower court entered an order staying the order of the Commission for 30 days from November 2, 1934 (R. 70). On November 23, 1934, an order of severance was entered in the lower court, permitting appellants to prosecute this appeal without joining the Yards Company as a party thereto (R. 73).

On this appeal, all the oral evidence taken in the proceeding before the Commission has been reduced to narrative form under a stipulation of the parties (R. 77) and an order (R. 76) that such narrative is a true and correct statement in narrative form of the oral testimony taken in those proceedings, and that it sets forth in condensed form all oral testimony offered on the trial of the case and which is essential to the decision of all questions presented by the appeal. All of the exhibits received on the hearings before the Commission, and which were included as a part of Exhibit 1 in the lower court, have been certified to this Court as original exhibits and are on deposit with the Clerk (R. 77). In addition, the exhibits numbered 1, 2, 4, 5, 10 to 14, inclusive, 21, 22, 23, and two exhibits furnished to the Commission after the hearings before it had closed, have been reproduced and are submitted to this Court with the printed record.

4. Proceedings in this Court.

On November 15, 1934, Mr. Justice Stone, on motion of appellants and the Yards Company, entered an order (R. 79) staying the order of the Commission pending the determination of this appeal, the order being conditioned upon the filing by appellants and the Yards Company of a stay bond in the amount of $5,000 to be approved by a judge of the lower court and filed in that court. This stay bond was approved and filed in the lower court on December 3, 1934 (R. 80).

The record in the case (R. 95 *et seq.*) was filed in this Court on December 28, 1934, apppellants' statement of points relied upon (R. 185) being filed on the same day. In accordance with paragraph 5 of Rule 12 of the Rules of this Court, a statement of the grounds upon which the jurisdiction of this Court is invoked, filed by appellants in the lower court, was printed and distributed by the Clerk of this Court. On January 14, 1935, this Court entered an order noting probable jurisdiction in the cause.

Specification of Errors.

Appellants make the following specification of errors:

1. The lower court erred in finding that the Commission properly assumed jurisdiction of the yardage charges of the Yards Company under Section 15 (5) of the Interstate Commerce Act; in finding that the Yards Company renders transportation services upon the shipments of live stock dealt with in the order of the Commission, made on July 2, 1934; in finding that the facilities of the Yards Company constitute the livestock terminals of appellants in Chicago, and in finding that appellants employ the facilities of the Yards Company and the services of its employes in effecting the delivery of live stock at the stockyard as a part of appellants' transportation services.

2. The District Court erred in finding that under paragraph 3 of Section 1 of the Interstate Commerce Act the jurisdiction of the Commission extends beyond a suitable unloading pen, in the case of shipments of ordinary live stock in car loads consigned to public stockyards, and in finding that the transportation service performed by appellants upon shipments of ordinary live stock in car loads to the Union Stock Yard in Chicago, Illinois, extends beyond suitable unloading pens in such stockyard.

3. The District Court erred in finding or assuming that the record made in the proceedings before the Commission is sufficient to support the order made by said Commission therein on July 2, 1934.

4. The District Court erred in failing to find that under Section 15 (5) of the Interstate Commerce Act appellants' duties and obligations as common carriers of shipments of ordinary live stock consigned to the Union Stock Yard in Chicago, Illinois, end when such live stock is unloaded into suitable pens at said stock yard; in failing to find that on such shipments there is no transportation service performed by appellants after such shipments have been placed in suitable unloading pens, and in failing to find that the Commission has no jurisdiction with respect to said shipments after they have been unloaded into suitable pens at the Union Stock Yard in Chicago, Illinois.

5. The District Court erred in finding that the order of the Interstate Commerce Commission made on July 2, 1934, is within the power of said Commission and is a proper exercise of power by it, and in failing to find that said order is beyond the power of said Commission, in that it imposes upon appellants duties and obligations beyond those which the law requires them to sustain.

6. The District Court erred in finding that the order of the Commission made on July 2, 1934, is not so indefinite and uncertain as to be invalid and void; in finding that said order is not invalid and void because of the failure of said Commission to make suitable findings upon which its said order might have been properly based; in failing to find that said order is invalid and void because of the failure of said Commission to find in what respects and in what ways, if any, the practices of appellants are in violation of the law, and in finding or assuming that in the said order and in the report constituting a part of said order, said

Commission made any finding of unreasonableness under Sections 1 and 15 of the Interstate Commerce Act.

7. The District Court erred in failing to find that the Yards Company is not a common carrier and that by reason thereof the said order of the Commission, made on July 2, 1934, is invalid and void, and in finding unlawful the collection by the Yards Company of the yardage charges dealt with by the Commission in said order.

Summary of Argument.

I.

It might be concluded from the order made by the Commission and here assailed that the Commission has held that the interstate transportation of ordinary live stock in car loads to the stockyard of the Yards Company does not terminate when such animals are placed in suitable unloading pens at the stockyard, but continues, in the case of live stock delivered to consignees at the unloading pens, until such consignees have had an opportunity to remove such live stock from the stock yard without the payment of any charge additional to the freight rate. If the Commission's report and order is to be given this effect, it is void for the following reasons:

1. Under a proper construction of Sections 1 (3) and 15 (5) of the Interstate Commerce Act and the Packers' and Stock Yards Act, 1921, the transportation of ordinary live stock in car loads to public stockyards terminates when such live stock is unloaded into suitable pens at the stock yard.

2. For many years the consignors and consignees of live stock, the Yards Company, the appellants, the Commission and the Secretary of Agriculture have acquiesced in the

termination of appellants' transportation obligations on such shipments, upon the unloading of the animals into such unloading pens. This construction of the law is now binding upon the Commission.

3. The prior decisions of the Commission and of the courts are in accordance with the theory that under the law, the transportation of such shipments does not extend beyond suitable unloading pens at public stockyards.

4. Appellants, through facilities of their own and located upon their lines of railroad in Chicago, have afforded to consignees of live stock an opportunity to secure delivery of live stock without the payment of charges additional to the transportation charges. Such opportunity is a full compliance by appellants with any obligations which may be cast upon them by the law as the Commission has apparently construed it. The Commission's holding to the contrary is in contradiction to every previous decision by it upon the subject.

5. It is necessary that there be a known ascertainable point at which the jurisdiction of the Commission terminates and the jurisdiction of the Secretary of Agriculture attaches. Ever since the Yards Company has been in operation, that point has been fixed at the unloading pens of the Yards Company, with the acquiescence of every party in interest and of every governmental authority. To give effect to the Commission's order will result in practices which have never before existed and as a practical matter, will create a situation which will make it impossible to definitely determine the rights, obligations and duties of appellants, the Yards Company, the Commission and the Secretary of Agriculture.

II.

Even if the Commission's presumed construction of law with respect to appellants' carrier obligations on shipments of ordinary live stock consigned to the stockyard is correct, the order is void in that it confers upon the Hygrade Company the right to use extraordinary facilities now in existence, the use of which is not necessary to afford free access for the purposes of delivery but only serve to make a delivery more convenient to the Hygrade Company. There is no law which imposes upon appellants the obligation to supply such facilities for use by consignees. The Commission's order, therefore, has the effect of imposing upon appellants duties and obligations in excess of those warranted by any view of the law.

III.

Under the law the Commission is required in its report to make those quasi-jurisdictional findings which the Interstate Commerce Act requires and which are necessary as a foundation for any valid order. It is also under obligation, in making its orders, to make them sufficiently definite so that they may be capable of application by reasonably intelligent people. The report and order in the case at bar does not meet either of these requirements. The Commission has not made any of those findings which the law requires it to make if its order is to be sustained. The result is that the report and order are so vague and indefinite that appellants do not know and could not know what they should do in order to comply with the order. Under these circumstances the order must be set aside.

ARGUMENT.

I.

THE TRANSPORTATION OF INTERSTATE SHIPMENTS OF ORDINARY LIVESTOCK DELIVERED BY APPELLANTS AT THE STOCKYARD OF THE YARDS COMPANY IN CHICAGO, TERMINATES WHEN THE ANIMALS ARE UNLOADED INTO SUITABLE PENS. THE ORDER HEREIN ASSAILED IS APPARENTLY BASED UPON A DIFFERENT VIEW OF THE LAW AND IT IS, THEREFORE, VOID.

It might be assumed, from what the Commission has said in its report in the case at bar, that in its judgment, the transportation of ordinary livestock by appellants to the Hygrade Company at the stockyard does not terminate when the animals are unloaded into suitable pens but continues, in the case of some shipments at least, for some time thereafter. The view of the Commission seems to be that with respect to shipments, delivery of which is taken by the Hygrade Company at the unloading pen and which are thereafter removed from the stockyard without the use of holding pens or the furnishing of a stockyard service, appellants are under an obligation to furnish to the Hygrade Company an opportunity to so remove the livestock without the payment of any charge additional to the freight rate. There is no finding by the Commission to this effect, but on the theory that this was the conclusion of the majority, five Commissioners dissented from the majority report. The lower court also seemed to feel that the Commission had so held for it said (R. 59) that the Commission was right in holding that the charges of the Yards Company, dealt with in the Commission's order, were collected for transportation services. The question presented under this view of the Commission's order is whether or not appellants are under any such obligation with respect to shipments of ordinary livestock delivered by them at the stockyard. We submit that appellants have no such obligation under any consideration of the law and the facts.

(a) Section 15 (5) of the Interstate Commerce Act (49 U. S. C. A., Sec. 15; 41 Stat. 484) which became effective March 1, 1920, reads as follows, in so far as it is here material:

> "Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner * * * Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards."

The general rule is that the duty of loading and unloading carload freight rests upon the shipper or consignee. *Chicago Live Stock Exchange* v. *Carriers,* 52 I. C. C. 209; *Adams* v. *Mills,* 286 U. S. 397, 410; *Pennsylvania R. Co.* v. *Kittaning Co.,* 253 U. S. 319, 323. The railroads serving Chicago relaxed this rule on shipments consigned to the stockyard. From the time the Yards Company started operation until 1917, appellants paid the charges of the Yards Company for loading and unloading livestock at the stockyard. When the Yards Company increased its loading and unloading charges in 1917, appellants refused to pay the increased charges, and this refusal led to the *Chicago Live Stock Exchange Cases,* decided at 52 I. C. C. 209 and 58 I. C. C. 164.

Section 15 (5) of the Interstate Commerce Act was enacted to meet this situation, the immediate cause of the enactment being the desire to make certain the duty of the railroads to absorb all loading and unloading charges of the Yards Company in the future. The effect of the legislation, therefore, was only to define and make certain an obligation which had always been voluntarily assumed by

the railroads theretofore but which they had denied with respect to the increased charges of the Yards Company.

As enacted in 1887, the Interstate Commerce Act provided in Section 1 (24 Stat. 379) that all charges for common-carrier service "or for the receiving, delivering, storage, or handling of such property shall be reasonable and just." In the Hepburn Act, passed in 1906 (34 Stat. 584), the term "transportation" was defined, and this definition was amplified somewhat by the Transportation Act 1920 (41 Stat. 474). The 1920 enactment, however, does not affect the issues in this case. Since 1906, the term "transportation" has been defined (with the exception of bracketed words which were added in 1920) in Section 1 (3) as follows:

> "The term 'transportation' (as used in this Act) shall include (locomotives), cars, and other vehicles, (vessels,) and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, expressed or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

Thus, for many years prior to 1920, interstate transportation by common carriers had included all services in connection with the delivery of property transported. Notwithstanding this fact, appellants had never assumed any obligation beyond the unloading pens on livestock consigned to the stockyard. During all these years, consignees paid the yardage charges of the Yards Company with no thought or claim that the services for which the charges were made, performed by the Yards Company after livestock had been placed in unloading pens, were a part of transportation. And during all of the same years the Commission acquiesced in this view. While Section 1 (3) of the Act defines transportation as including all services in connection with delivery, what constitntes delivery is not de-

fined. To determine what constitutes delivery reference must be had to the facts and the law. *Adams* v. *Mills*, 286 U. S. 397, 409, 410.

It was with this background of fact and law that Section 15 (5) was enacted. It only requires that on the livestock therein referred to consigned to public stockyards, the transportation service shall include the service of loading and unloading. Considering the circumstances, it may only be said that it sought, by extension of the railroads' liability, to make certain that obligation which the railroads had denied by declining to absorb the increased loading and unloading charges of the Yards Company. This is plainly indicated by the statement in the paragraph that the transportation referred to "shall include" the loading and unloading. These words constitute a term of extension; that is to say, they operate to extend a previously existing obligation with respect to transportation and delivery.

Because of special conditions affecting the transportation of livestock to public stockyards, Congress saw fit to extend the obligation of the railroads to definitely include services as to which there had been dispute. The paragraph presupposes a delivery of livestock through the use by consignees of the facilities maintained by public stockyards, upon the theory that by specifying delivery at a public stockyard a carrier is informed that the stockyard is to receive the livestock even though they be consigned to a person other than the owner of the stockyard. That this was the theory of Congress is indicated in the Congressional debates had when Section 15 (5) was discussed in Congress. Senator Cummins, after stating the purpose of the paragraph to be the desire of shippers to know definitely from railroad tariffs what they would be required to pay for the transportation of livestock consigned to public stockyards, said (Congressional Record, Vol. 59, part 1, page 674:

"I am entirely in sympathy with the purpose of

> these shippers and want to bring the whole subject within the jurisdiction of the Interstate Commerce Commission, and compel the carriers to state in the published tariffs the rate that must be paid by the shipper for the entire service of taking the property at the point of origin and delivering it to the point at which it is to leave the car."

That the purpose of Congress in enacting Section 15(5) was to extend the carrier obligation only to the unloading pen is further indicated definitely by the discussion had in Congress at the time the Packers & Stockyards Act, 1921 (7 U. S. C. A., c. 9; 42 Stat. 159) was under consideration. Section 201 of that Act defines "stockyards services" as follows:

> "The term 'stockyard services' means services or facilities furnished at a stockyard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock."

Thus, it is clear that the receipt, handling and delivery of livestock were intended to be stockyards services. Section 226 of the same Act provides:

> "Nothing in this chapter shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such commission."

As appears from the dissent to the Commission's report in this case (R. 33), the Chairman of the Committee on Agriculture thus stated the jurisdiction to be conferred upon the Secretary of Agriculture by the Packers & Stockyards Act, 1921:

> "The Secretary shall have jurisdiction from the time the livestock is unloaded at the terminal yards and after it is out of the jurisdiction of the Interstate Commerce Commission. Up to the time of unloading the livestock the Interstate Commerce Commission has jurisdiction over the shipment * * *. Hence it is

proposed that the Secretary's jurisdiction shall begin where the Interstate Commerce Commission's jurisdiction ends."

Thus, Congress apparently thought, both when it enacted Section 15 (5) and the Packers & Stockyards Act, 1921, that on shipments of ordinary livestock to public stockyards it was extending the Commission's jurisdiction to the unloading pen, that being fixed as the farthest limit of the carrier's liability, and that any services thereafter performed by public stockyards in connection with such shipments should be subject to the jurisdiction of the Secretary of Agriculture. Having regard to the facts, this is the only effect which the legislation could be supposed to have. Certainly, the Congress knew that on shipments to public stockyards, railroads had never done more than put livestock in suitable unloading pens. This had been so in the case of the Chicago stockyard for more than 50 years, and it was with particular reference to that stockyard that Section 15 (5) was enacted.

If the legislation be viewed as requiring railroads to do more than deliver livestock into suitable pens at public stockyards, it then necessarily requires such stockyards to perform a service without compensation, or requires railroads to pay for the use by them of facilities which they do not own and which are usually not on their lines of railroad. If Congress had any such intentions, they would have been expressed in plain language, since such requirements would have gone far beyond any obligation theretofore assumed by or imposed upon railroads.

It does not seem to us there is any conflict between Sections 1 (3) and 15 (5) of the Act. As we have said, what constitutes the delivery mentioned in Section 1 (3) is a question of fact and law. It is well known that a carrier's delivery obligations vary with the class and character of commodities. Section 15 (5) only makes it certain that the

delivery of livestock at public stockyards shall include unloading. But even if there were such a conflict, Section 15 (5) would control, it being the later and specific enactment. *Townsend* v. *Little*, 109 U. S. 504, 512; *Washington* v. *Miller*, 235 U. S. 422, 428; *United States* v. *Hess*, 71 Fed. (2d) 78, 79.

(b) A further justification for the construction we claim should be put upon the law lies in the facts. Those facts show that for almost 70 years every interest has conceded a termination of appellants' liability and obligations upon their delivery of livestock into the unloading pens at the stockyard. For that length of time shippers and consignees have paid the yardage charges of the Yards Company without complaint, so far as the record shows. No one has contended that appellants had any obligations beyond those unloading pens, which the report of the Commission in the case at bar specifically states are suitable pens (R. 30).

Acquiescence in this termination of appellants' liability has been evinced by the Hygrade Company, the complainant before the Commission. It purchased its plant adjacent to the stockyard with full knowledge of the methods of operation which had prevailed for many years and with knowledge of those yardage charges of the Yards Company which it would be required to pay on animals received by it through the stockyards. It bought this plant in August, 1929 (R. 119), yet its complaint before the Commission was not filed until March, 1931 (R. 8). In the meantime, so far as the record shows, its only effort to avoid the payment of yardage charges to the Yards Company on any shipments was through the making of demands that livestock consigned to it be delivered at its plant without going through the stockyard (R. 114).

The Commission has also acquiesced in the thought that it had no jurisdiction beyond the unloading pens. As we have said, the view that it now has such jurisdiction re-

quires the assumption that it has had it since 1906, at least. Yet the Commission, up to this time, has never asserted or exercised such jurisdiction, although it has had many occasions for so doing. Thus, after the decision of this Court in *United States* v. *Union Stock Yard & Transit Company*, 226 U. S. 286, the Yards Company, pursuant to the holding of this Court that it was a common carrier subject to the Commission's jurisdiction, filed with the Commission its tariffs covering its loading and unloading charges but did not file any tariffs stating its yardage charges on any shipments. The Commission accepted the tariffs showing the loading and unloading charges apparently upon the theory that they discharged the obligations of the Yards Company with respect to the filing of tariffs with the Commission, and made no demand whatever that tariffs should be filed by the Yards Company stating its charges for any other of its activities.

In its decisions in the *Chicago Live Stock Exchange Case, supra*, the Commission held that the Yards Company was a common carrier and as such was required to maintain its loading and unloading charge tariffs on file with the Commission, but again did not indicate any thought that the yardage charges of the Yards Company should be similarly published. The common-carrier status of the Yards Company being an issue in that case, the Commission might well have required the filing by the Yards Company of tariffs stating its yardage charges, had it felt that in assessing those charges the Yards Company was performing or participating in a transportation service or that there was any transportation of livestock beyond the unloading pens at the stockyard.

That this has been the uniform view taken of appellants' obligations appears not only from the acquiescence of consignees and the Commission but also from affirmative action taken by the Secretary of Agriculture. As appears

from the record in this case, the Secretary of Agriculture initiated an investigation of the Yards Company shortly after the Packers & Stockyards Act, 1921, became effective. Included in that investigation was the question of the propriety and legality of all charges of the Yards Company assessed for stockyards service, including the very yardage charges over which the Commission has apparently asserted jurisdiction in the case at bar. At the time of the hearings had in this case before the Commission, the proceeding before the Secretary of Agriculture was pending (R. 152) and, as a matter of fact, is still pending. The Commission's decision, if it be given the effect of an assumption of jurisdiction over the yardage charges of the Yards Company, creates a direct conflict in jurisdiction as between the Commission and the Secretary of Agriculture.

The yardage charges of the Yards Company are contained in tariffs filed with the Secretary of Agriculture, and the Yards Company is required by the Packers & Stockyards Act, 1921, to collect them. Yet if the Commission's order is sustained, the Yards Company will violate the law by collecting some of those charges. And the Secretary's investigation of those charges is aborted, to some extent, by the Commission's order.

If there were any reasonable doubt as to the proper construction of the statutes here involved, the practical construction of those statutes by the agencies of the Government and by shippers, consignees, carriers and public stockyard companies alike must control. The principles announced in *United States* v. *Alabama Great Southern R. R. Co.*, 142 U. S. 615, 621, are applicable here:

> "We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that department—a construction which, though inconsistent with the literalism of the act, certainly consorts with the equities of the case—

should be considered as decisive in this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced. It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive, and to require from him the repayment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the government."

In *Emergency Fleet Corporation* v. *Western Union Telegraph Co.*, 275 U. S. 415, 418, this Court held that the practical construction given a statute was not only persuasive but decisive of the case, saying:

"For the construction given to the Act by the United States and acquiesced in by the Western Union, having been both contemporaneous and thereafter consistently and widely applied, is not only persuasive but, in our opinion, decisive of the case. *United States* v. *Alabama Great Southern R. R. Co.*, 142 U. S. 615. Compare *District of Columbia* v. *Gallaher*, 124 U. S. 505, 510."

The doctrine was applied to the Constitution in *The Pocket Veto Case*, 279 U. S. 655, 688, and was applied by the Commission itself in the construction of tariffs in the case of *American Asphalt Roof Corporation* v. *A. T. & S. F. Ry. Co.*, 156 I. C. C. 147, 155.

In *United States* v. *Chicago, North Shore & Milwaukee R. Co.*, 288 U. S. 1, the Government attempted to enjoin the railroad company from issuing any securities or assuming any obligation or liability with respect to the securities of others without first having obtained an order from the Interstate Commerce Commission authorizing it so to do. This Court upheld the carrier's contention that it was not

subject to the security provisions of the Interstate Commerce Act, and held that the Commission's consistent failure to exercise jurisdiction over the carrier's security issues and obligations precluded a construction which would enable the Government to maintain its case. In so holding this Court said (p. 14):

> "The primary responsibility rested upon the Commission to determine whether under the circumstances the railroad was required to procure leave under Section 20a for the issuance of securities. Evidently entertaining serious doubts on this question it has for more than a decade resolved them in favor of the carrier, and the company and its officers have acted in reliance on the administrative tribunal's construction of the statute. At this late day the courts ought not to uphold an application of the law contradictory of this settled administrative interpretation."

We submit that under the foregoing, the Commission is now precluded from a holding that appellant's obligations extend beyond the unloading pens at the stockyard. In *Adams* v. *Mills*, 286 U. S. 397, where this Court had under consideration the loading and unloading charges of the Yards Company, it was said at pages 409 and 410:

> "Whether the unloading in the yards was a part of transportation was not a pure question of law to be determined by merely reading the tariffs. The decision of the question was dependent upon the determination of certain facts including the history of the stockyards and their relation to the line haul carriers, the history of the unloading charge at these yards and the action of the parties in relation thereto."

If the same rule be applied in this case, to determine where appellants' carrier obligations end on shipments of ordinary livestock to the stockyard, it must be held that these obligations terminate when such livestock is deposited in suitable pens at the stockyard.

(c) As indicating the proper construction to be placed upon Section 15 (5), we may also refer to prior decisions

of the Commission itself and of the courts. The Commission has held that the final clause of Section 15 (5) did not operate to alter any carrier duty at other than public stockyards. *Omaha Packing Company* v. *Carriers,* 66 I. C. C. 44, 49; *Arizona Packing Company* v. *Carriers,* 74 I. C. C. 223.

In *Southwestern Horse & Mule Co.* v. *Carriers,* 129 I. C. C. 730, the Commission directly passed upon the meaning and effect of Section 15 (5). As appears from the report of the Commission in that case, there were involved charges made for the delivery of livestock at the public stockyard in North Fort Worth, Texas, the facts being practically the same as those in the case at bar. Dealing with the yardage charges there made and the matter of its jurisdiction under Section 15 (5), the Commission said at pages 737 and 738:

> "A careful reading of the amendment to section 15 in the light of prior and subsequent decisions dealing with questions closely related to that here presented leads to the conclusion that transportation of ordinary livestock, in carloads, to public stockyards ends when the animals are unloaded into suitable pens at such yards. It follows that this marks also the limit of our jurisdiction over such shipments. This conclusion is strengthened by consideration of the provisions of the Packers and Stockyards Act, 1921, approved August 15, 1921, and of the decision of the Supreme Court upholding the constitutionality of that act."

This is a definite holding that the limit of the Commission's jurisdiction over shipments of ordinary livestock to public stockyards was the suitable pens into which the animals were unloaded. This decision was followed and approved in *Allied Packers* v. *Carriers,* 144 I. C. C. 377, which presented the case of a public stockyard owned by the New York Central at Buffalo, New York. Passing on its jurisdiction over the yardage charges there involved, the Commission said at pages 381 and 382:

> "Under section 15 (5) of the interstate commerce

act the transportation subject to that act includes 'delivery' of the stock into 'suitable pens' at the stockyards. Defendants were required to unload complainants' shipments into suitable pens, but not to drive them through the chutes and overhead runway to complainants' plant, without additional compensation. In our opinion, therefore, the transportation ended when the stock was unloaded into the chutes or storage pens, if the latter were used, and thereafter it was subject to the provisions of the Packers and Stockyards Act of 1921. See *Southwestern Horse & Mule Asso.* v. *A., T. & S. F. Ry. Co.*, 129 I. C. C. 730."

Upon rehearing of this case at 161 I. C. C. 641, the previous decision was reversed, but only because the stockyard was the only facility furnished by the railroads through which the delivery of livestock could be made, and because it was owned and operated by a trunk line which served it. In reversing its previous decision in the same case, however, the Commission did not overrule its conclusion with respect to its jurisdiction under Section 15 (5), as expressed in the *Southwestern Horse & Mule Company Case*, 129 I. C. C. 730. On the contrary, it distinguished its ruling in that case by saying at page 645:

"The previous report cites with approval *Southwestern Horse & Mule Asso.* v. *A., T. & S. F. Ry. Co.*, 129 I. C. C. 730. In that case Division 1 considered the question of the jurisdiction of this commission over yardage charges on shipments of horses, mules, burros, and asses, delivered to dealers through the public stockyards in North Fort Worth, Tex. In several particulars the situation there differed materially from that here presented. The line-haul carriers there did not directly serve the stockyards but shipments were handled to and from the stockyards by a belt railway. The belt railway was not a defendant in that case. The stockyards company at North Fort Worth was a separate corporate entity, totally independent of the trunk lines. The line-haul carriers had adequate and accessible facilities regularly established where delivery of the shipments could have been made without a charge for yardage."

Every ground thus stated for distinguishing the *Southwestern Horse & Mule Company Case* under the decision in the *Allied Packers Case* exists in the case at bar. The stockyard in Chicago is served only by the Chicago Junction Railway, which is a belt line. The Yards Company is now a separate corporate entity, completely independent of any trunk line, and appellants, as we shall hereafter show, have adequate facilities on their own lines where livestock will be delivered without any charge additional to the freight charges.

In *E. Kahn's Sons Co.* v. *Carriers,* 192 I. C. C. 705, the yardage charges at the Cincinnati public stockyard were under attack. With respect to its jurisdiction over such charges under Section 15 (5) the Commission said at pages 709 and 710:

> "In *Southwestern Horse & Mule Asso.* v. *Atchison, T. & S. F. Ry. Co.,* 129 I. C. C. 730, a yardage charge on horses, mules, burros, and asses collected at the public stockyard in North Fort Worth, Tex., by the Fort Worth Stock Yards Company was assailed as unreasonable. This charge was made for the use of the stockyard facilities from the time the animals were taken out of the unloading pens, and for the services rendered, except unloading. In that case it was shown that for several years the line-haul carriers had maintained individual pens and other stockyard facilities at Fort Worth some 2 to 4 miles from the public stockyards that had been and were accessible to and adequate for the traffic under consideration, and that no yardage charge was made for the use of such facilities. We there expressed the view that transportation of ordinary live stock, in carloads, to public stockyards ends when the animals are unloaded into suitable pens at such yards and that this marks the limit of our jurisdiction over such shipments. We found that we were without jurisdiction to determine the issues respecting the yardage charges assailed. In that case, as in the instant case, adequate and accessible facilities were provided whereby the consignees could take delivery without additional charges.
>
> We find that the charges assailed are not subject to our jurisdiction. The complaints will be dismissed."

The foregoing denial of jurisdiction by the Commission and its refusal to award reparation was attacked in a petition for mandamus in the Supreme Court of the District of Columbia which dismissed the petition. The decision of that court was affirmed by the Court of Appeals for the District in *United States, ex rel.* v. *Interstate Commerce Commission*, 73 Fed. (2d) 948. As stated by the Court of Appeals (p. 950), the contention of the Commission was:

> "that it decided the issues of fact and denied relief because of a conclusion that under the Act it could not legally require the repayment of money exacted by a stockyards company for yardage services."

This contention was upheld by the Court of Appeals. On January 11, 1935, this Court denied certiorari in the case.

In *Adolf Gobel* v. *Carriers*, 200 I. C. C. 606, the Commission dismissed a complaint against the yardage charges of the public stockyard at Benning, D. C. Dealing with its power under Section 15 (5), the Commission said at page 608:

> "In *E. Kahn's Sons Co.* v. *Baltimore & O. R. Co.*, 192 I. C. C. 705, we found that the transportation of ordinary live stock, in carloads, to public stockyards ends when the animals are placed into suitable unloading pens, and that we had no jurisdiction over the yardage charges. * * * We find that the yardage charges assailed are not subject to our jurisdiction. The complaint will be dismissed."

In *Burton* v. *Wabash Railway Company*, 332 Mo. 268, 58 S. W. (2d) 443, the action was to recover damage to livestock inflicted after the animals had been put into unloading pens at the public stockyard located in East St. Louis. The Supreme Court of Missouri held that the Railroad Company was not liable for such damage, saying [58 S. W. (2d) 446]:

> "The discharge of respondents' cattle from the cars into the unloading pens at the National Stock Yards in East St. Louis was not only a part of the transportation, but it was the last act of fulfillment by appellant of its contract of carriage."

The foregoing is a definite holding that upon placing the livestock there involved in the unloading pens, the Railroad Company had terminated its transportation and completely discharged its obligations. After referring to the Packers & Stockyards Act, 1921, the Court further said [58 S. W. (2d) 447]:

> "The schedule of charges, having been made, by command of the federal law and having received its sanction from the Secretary of Agriculture, was not a mere private price list of the stockyards company. The beneficiaries of the services to be rendered by the stockyards company were by law definitely fixed or ascertainable. The line of demarcation where service to the carrier ends and service to the shipper or consignee begins is exactly determinable. There is no overlapping of zones of service to carrier and shipper, and no form of service that may be rendered by the stockyards company that is not contemplated by law or is not covered by the schedule of charges."

From the foregoing it is plain that in the cases so far decided the opinion has been that under Section 15 (5), a carrier's liability on ordinary livestock transported to a public stockyard terminates when the animals are deposited in suitable unloading pens. It is true that in the *Kahn Case, supra,* and in the *Gobel Case, supra,* the Commission's report shows that ingress and egress were afforded to shippers and consignees at the public stockyards without the payment of any charge, but this factor is not determinative of the legal meaning to be attached to Section 15 (5). As is pointed out in the dissent from the Commission's report (R. 32, 33) since transportation ends at the unloading pens, what occurs thereafter is of no importance.

(d) The decision of this Court in *Covington Stock Yards Company* v. *Keith,* 139 U. S. 128, is largely quoted in the Commission's report (R. 28, 29), presumably in support of the legal proposition that in connection with the transportation of livestock to stockyards, carriers are under

some obligation to afford access to consignees so that they may secure delivery of their livestock without charge additional to the freight rate. The same right of access has been referred to by the Commission in its report in some of the cases we have cited.

In the *Southwestern Horse & Mule Company Case*, 129 I. C. C. 730, the Commission's report (p. 735) recites the fact that the railroads maintained facilities of their own some distance from the public stockyard through which deliveries could be made without charge. In the *Kahn Case*, 192 I. C. C. 705, and the *Gobel Case*, 200 I. C. C. 606, the reports of the Commission state that at the stockyards there involved, an opportunity to secure delivery without charge was afforded consignees.

Even if an opportunity to secure such delivery is essential under the law, the record fails to support the order made by the Commission in the case at bar. The evidence is that appellants maintain facilities on their own rails within the Chicago Switching District, at which facilities delivery of livestock consigned to Chicago will be made without charge additional to the Chicago rate (R. 121, 122).

Moreover, the tariffs of appellants, on file with the Commission and certified to this Court, provide that the Chicago rates will apply on livestock delivered at appellant's facilities. Thus, A. T. & S. F. Tariff No. 6180-K, I. C. C. No. 10680, Items 790 and 800, page 94, definitely states that the livestock station of the Santa Fe in Chicago is located at Corwith and that the Chicago rates published by that road will apply only on deliveries made at that station. Burlington Tariff No. 4636-M, I. C. C. No. 17678, Item 36, page 14, states that the Burlington has unloading facilities for livestock on its rails at Harrison and Canal Streets in Chicago, and at Clyde Station, and that on deliveries at those facilities the Chicago rate will apply.

The tariffs filed by the other appellants contain similar

provisions. Even if there was no proof that appellants maintained such facilities on their own lines, the fact would be presumed from the statements contained in appellant's tariffs and the specific publication of rates to those facilities. *Interstate Commerce Commission* v. *Chicago Great Western Railway Company*, 209 U. S. 108, 119, 120; *Cincinnati, N. O. & T. P. R. Co.* v. *Rankin*, 241 U. S. 319, 327.

The tariffs of the individual appellants contain no rates on livestock consigned to the stockyard. They refer to Chicago Switching Tariff No. 20-S, I. C. C. No. 82, for a statement of such rates (R. 178). That tariff, also a part of Exhibit 1 certified to this Court, strictly limits the service which appellants will perform on shipments consigned to the stockyard, and specifies the rates that will be charged for such transportation. At page 76, the tariff provides for the assessment of the Chicago rates, plus $2.70 a car on shipments via western lines and $1.35 a car on shipments via eastern lines, on "livestock from or to industries, chutes or sidings of the Union Stock Yard & Transit Company at Union Stock Yards." The chutes referred to in this tariff provision are the unloading pens, which are alternatively known as unloading chutes (R. 150). The same tariff provides that in making delivery into those chutes, appellants will absorb the unloading charge of the Yards Company in the amount of $1.00 per car. Thus, the tariff is plain in providing not only the rate which will be charged for the transportation, but the precise delivery that will be made.

The Hygrade Company was not ignorant of this tariff arrangement when it purchased its plant adjacent to the stockyard and appellants' tariffs, which make the entire arrangement clear, are sufficient to charge the Hygrade Company with knowledge even if it did not otherwise have it. *Louisville & Nashville Railroad Company* v. *Maxwell*,

237 U. S. 94, 97, 98; *Kansas City Southern Railway Company* v. *Carl*, 227 U. S. 639, 652, 653.

Thus, the tariffs of appellants offered and now offer an alternative delivery, not only to the Hygrade Company but to all other consignees of livestock transported to Chicago. For the Chicago rate, any consignee has the right to receive his livestock at the facilities maintained by each appellant on its own line. Such a delivery would doubtless be agreeable to any consignee who maintained his packing house adjacent to those facilities. If, however, such consignee desires a delivery at the stockyard, where his livestock can receive such stockyard service and care as may be necessary and where he has the benefit and advantage of the public market, he can secure such delivery into unloading pens or chutes at the stockyard upon payment of $2.70 or $1.35 per car additional to the Chicago rate. Any additional charges made by the Yards Company must be paid by him. Or, if the Hygrade Company or any other consignee located on the Chicago Junction Railway desires delivery at its plant, it can secure such delivery by paying the Chicago rate plus the switching charge of the Chicago Junction (R. 178, 179). This rate was held reasonable by the Commission in the case at bar (R. 27).

Appellants do not, however, hold themselves out to deliver livestock consigned to the stockyard, at any other point than at the unloading chutes. From there on, the consignees must take care of any charges which may accrue, and since 1867 they have paid, without objection, the yardage charges assessed by the Yards Company. With respect to this situation, the Commission said in its report (R. 26):

> "Within the switching limits of Chicago, in addition to the facilities of the Union Stock Yards, certain of the line-haul carriers maintain facilities for un-

loading livestock, the use of which by complainant is impractical."

There is no allegation in the complaint of the Hygrade Company filed with the Commission of any failure on the part of appellants to maintain suitable and sufficient facilities of their own in Chicago where livestock may be delivered. Nor was there any complaint that their use was impractical. There was simply no issue with respect to these facilities whatsoever.

The statement by the Commission that the use of appellants' facilities by complainant is impractical is plainly wrong, and must be based entirely upon the statement of one of complainant's witnesses, who, after saying that he could get delivery on the Chicago & North Western at Proviso, said that the reason he did not do so was because it was too far away and thus impractical (R. 121). Admitting that he could get delivery at the facilities maintained by the individual appellants on the Chicago rate, he said that he could also get delivery at Clinton, Iowa, which would be cheaper and just about as convenient (R. 122). Thus, all that can properly be said is that deliveries at appellants' facilities are not convenient from the standpoint of the Hygrade Company.

The fact is that the Hygrade Company located itself in a plant immediately adjacent to the property of the Yards Company in order to serve its own convenience. Of necessity it purchases most of the livestock used by it at the public market maintained by the Yards Company (R. 126). If its plant was located anywhere but at the stockyard, the livestock necessarily bought by it at the stockyard would have to be trucked to that plant. The location of its plant at the stockyard makes it equally inconvenient for the Hygrade Company to receive livestock through the facilities owned by appellants, since such stock must be driven or

trucked from those facilities to its plant adjacent to the stockyard. Its complaint to the Commission was nothing more than an effort on its part to impose upon appellants or the Yards Company some portion of the burden with respect to deliveries, which burden necessarily resulted from the location of its plant at the stockyard.

We know of no rule of law requiring carriers to locate their facilities with reference to the convenience of one consignee only. All the individual facilities owned by appellants are in the Chicago switching district (R. 121, 122) which, from a rate and delivery standpoint, is Chicago, and this is sufficient to meet all requirements of the law. In the *Keith Case*, 139 U. S. 128, this Court said at page 136:

> "We must not be understood as holding that the Railroad Company in this case was under any legal obligation to furnish or cause to be furnished suitable and convenient appliances for receiving and delivering live stock at every point on its line in the City of Covington where persons engaged in buying, selling or shipping live stock chose to establish stockyards."

It should be remembered that appellants do not insist that livestock transported by them be delivered at the stockyard. It is a matter of no moment to them where such stock goes. The transportation to the stockyard is performed by appellants only because the shipper or consignee requires it. There is no material difference presented by the facts with respect to deliveries at the stockyard than would be presented by the case of a shipper consigning goods to a consignee on a private switch track located at the plant of a third party. In such case, the carrier must transport the goods to the destination named by the shipper, and has the right to assume that the consignee has made some arrangements for the use of the third party's track and property as the place of delivery. Certainly, it would be no fault of the carrier if the third party insists

upon compensation for the use of his property before permitting a delivery to be taken by the consignee.

It must also be remembered that the stockyard is an industry on the line of the Chicago Junction and not upon the line of appellants. Appellants operate over the Chicago Junction under a trackage arrangement. We think it must be conceded that in the absence of such an arrangement no shipper or consignee could have compelled appellants to operate with their own power over the rails of the Chicago Junction in order to reach the Union Stock Yard. Their action in this respect is entirely voluntary on their part. As conditions to this voluntary service, appellants have provided in their tariffs a higher rate and have limited their service to a delivery into the unloading pens or chutes at the stockyard. Notwithstanding these conditions, the Commission has apparently undertaken to impose upon appellants the maximum obligations which they would sustain at points on their own rails. To do so is obviously not just.

With respect to the maintenance by appellants of their own facilities, the Commission said (R. 28):

> "The fact that the line-haul carriers have other places of delivery at Chicago, where no extra charge is made, is not a legally sufficient reason, as contended by these carriers, for an extra charge at the Union Stock Yards."

The only authority quoted in the Commission's report for this extraordinary statement of law is the decision of this Court in *Covington Stock Yards Company* v. *Keith*, 139 U. S. 128. In that case Keith alleged that he had his own facilities for receiving livestock and prayed that the receiver of the Kentucky Central Railroad be required to show cause why he should not deliver livestock consigned to Keith at some suitable place outside the yards of the Covington Stock Yards Company free from other than the

customary freight charges. By a contract with the Stockyard Company the railroad had arranged for the use of the facilities and employees of the stockyard company for loading and unloading all livestock delivered to the stockyard company by the railroad, and the railroad had agreed to make the stockyards its depot for delivery of all livestock and not to build nor allow to be built on its premises any other yards for the receipt of such stock. The railroad had provided no facilities at Covington for receiving and delivering livestock except those of the stockyard company.

The lower court in its decree which was affirmed by this Court on review, found that the railroad had failed to provide a depot for livestock other than the yards of the stockyard company and ordered

> "that the said railroad company and said receiver shall hereafter receive and deliver from and to the said Keith & Wilson, at and through the said Covington stockyards all such livestock as may be brought to them or offered by them for shipment over said road and its connections, upon the consent of said stockyards, in writing, that it may be so done, being filed in this court."

It was further provided that

> "in default of such consent being so filed, it is ordered and decreed that upon said Keith & Wilson putting the platform and chute erected by them on the land of said Keith adjacent to the livestock switch of said railroad company north of said stockyards the said railroad company and said receiver shall receive and deliver all such livestock to said Keith and Wilson as shall be consigned to them or either of them or be offered by them or either of them for shipment at said platform."

Thus, the decision in the *Covington Case* turned on the fact that the railroad had not provided any facilities for unloading livestock except those of the stockyard company. The court recognized the fact that it could not compel the

stockyard company to permit the use of its facilities by the railroad without its consent. Instead, the court ordered the railroad and its receiver to make delivery at the facilities of Keith and his partner if the stockyard company would not permit the use of its property free of charge. Near the conclusion of the opinion of this Court, the fact that the decision was grounded on the failure of the railroad to furnish facilities of its own where delivery without extra charge could be had clearly appears from the following language (p. 136):

> "But as the appellant did not accord to appellees the privileges they were entitled to from its principal, the carrier, and as the carrier did not offer to establish a stock yard of its own for shippers and consignees, the court below did not err in requiring the railroad company and the receiver to receive and deliver live stock from and to the appellees at their own stock yards * * *."

It is thus quite obvious that a different conclusion would have been reached if the railroad had furnished facilities of its own at which livestock could have been shipped and received without additional expense for yardage.

The Commission's conclusion in the case at bar is also at variance with its previous decisions on the same point. In the *Southwestern Horse & Mule Company Case, supra,* the maintenance of other facilities by the railroads, under precisely the same circumstances as obtained in Chicago, was held by the Commission to be sufficient, and the decision of this Court in the *Covington Case, supra,* was distinguished upon this express ground. In the *Kahn Case, supra* and the *Gobel Case, supra,* free access at the stockyards there involved was held to be sufficient. The two latter cases do not hold, however, that free access must be afforded a consignee at a public stockyard. Free access at public stockyards was involved in those cases only because the public stockyards were the only places where there were

facilities at which livestock could be delivered. Had the railroads owned facilities of their own, as in the *Southwestern Horse & Mule Company Case, supra,* or as in the case at bar, free access at the stockyards would not have been necessary even in the Commission's view.

In *Central Stock Yards* v. *Louisville & Nashville Railway Company,* 192 U. S. 568, an effort was made to compel the Louisville & Nashville Railroad to receive and transport livestock to a stockyard upon the line of the Southern Railway, a connecting line of the Louisville & Nashville. The Louisville & Nashville maintained its own yard on its own rails. This Court held that there was no obligation upon the Louisville & Nashville to extend its transportation of livestock to a stockyard on the line of a connecting carrier, saying at page 571:

> "If the cattle are to be unloaded, then, as was said in *Covington Stock Yards Company* v. *Keith,* the defendant has a right to unload them where its appliances for unloading are, and cannot be required to establish another set hard by."

Thus, appellants having established their own facilities for unloading livestock in Chicago, cannot be compelled to establish, at the stockyard, another set of facilities at which they incur all obligations incurred by them at their own facilities. In order to suit the convenience of consignees, appellants have undertaken to transport livestock to the stockyard but have never undertaken to do more than put such livestock in unloading pens at that point. We submit that they cannot be compelled to do more at the stockyard than they now do. If the Hygrade Company or other consignees desire the convenience and advantage of deliveries at the stockyard, they must receive those deliveries under the conditions established when appellants voluntarily extended their service to that point. If, however, consignees do not desire deliveries at the stockyard under the

conditions fixed by appellants' tariffs they should take the deliveries at appellants' facilities. Appellants' obligations at the stockyard cannot be enlarged merely because appellant's owned facilities do not suit the convenience and desires of consignees.

The Commission also held (R. 26) that the stockyard was the livestock terminal of appellants at Chicago. This is not entirely true in fact. The livestock terminals of appellants in Chicago are the facilities maintained upon their own rails. It is true that the stockyard is also a livestock terminal of appellants, but it is only so to a limited extent; that is to say, only to the extent specified by appellants' tariffs.

This Court, in *Adams* v. *Mills*, 286 U. S. 397, 409, also said that at Chicago, the stockyard is the terminal of the line haul carriers, but that statement was only made in connection with the obligation of those carriers to load and unload livestock at the stockyard, a duty now imposed upon them by Section 15 (5). It is true that in making deliveries of livestock at the stockyard appellants must and do use the facilities of the Yards Company. But their use of those facilities to the extent now required by law does not make the stockyard a terminal of appellants at which they are required to sustain the maximum obligations imposed upon them at points on their own lines.

Surely, some consideration must be given to the conditions imposed by appellants when they voluntarily undertook to make deliveries at the stockyard with their own power. If these conditions are to be disregarded, the right of appellants to cancel the present rate and trackage arrangements must be conceded. If that were done, deliveries of livestock on the Chicago rate would only be made at the facilities maintained by each appellant. The rate to the stockyard would be the Chicago rate, plus the switching charges of the Chicago Junction Railway, and certainly

it would be reasonable, since in this case the Commission has approved it for application on shipments delivered at the plant of the Hygrade Company.

We submit that if there is any obligation upon appellants to furnish free access to consignees of livestock, they discharge that obligation at Chicago by furnishing such free access at their own facilities; and that they are under no obligation to do so at the stockyard, which is a station not on their lines of railroad. In apparently holding to the contrary the Commission has been compelled to disregard the facts, the plain provisions of appellants' tariffs, the decisions of this Court, and its own previous decisions on the same subject.

(e) The practical effect of what seems to be required by the Commission's order is also of substantial importance. As we have pointed out, for about 70 years the existing methods of doing business at the stockyard have obtained. Over that period of time appellants have done nothing more than deliver livestock at the stockyard into unloading pens or chutes. From that point onward consignees, including the Hygrade Company, have always paid the yardage charges of the Yards Company on each shipment so delivered. Under this method of doing business the Yards Company has grown until it now operates the largest stockyard in the world. The utmost speed and precision is required in the operation of appellants and the stockyard in order that the daily volume of livestock can be handled without delay or damage to the animals (R. 156).

Anything which complicates or makes more difficult the present arrangements would be most serious. The Commission's order, if sustained, will produce precisely that effect. It prohibits the collection of yardage charges upon all ordinary livestock in carloads consigned to the Hygrade

Company, in instances where delivery of such livestock is taken at the unloading pens, but under the Commission's report, such yardage charges may be assessed against animals put into unloading pens for storage or given any service by the Yards Company after the unloading. Thus, as a practical matter, in order to determine what charges should be assessed against each shipment, it will be necessary to follow it closely from the time it comes out of the car until it leaves the stockyard, in order to determine what is done with it.

The Court should understand that in the early morning hours of each day livestock is unloaded at the stockyard at the rate of approximately one car every two minutes (R. 167). Livestock unloaded into the unloading pens must be immediately removed to make room for succeeding carloads (R. 149). We may assume that in some cases consignees will be at the unloading pen ready to take their animals. It will thus be necessary, in connection with all such shipments, not only to effect a delivery at the unloading pen but thereafter to supervise such shipments in order to determine definitely that they are removed from the stockyard without receiving any of that service which the Commission has said would justify the imposition of a yardage charge. Only by so doing could appellants or the Yards Company determine the circumstances under which it would be proper to assess a charge. To do this will add substantially to the expense of deliveries at the stockyard, will produce confusion and as a matter of fact will be wholly impractical.

There is a further consideration. At the stockyard, the point where the jurisdiction of the Commission ceases and the jurisdiction of the Secretary of Agriculture begins must necessarily be determined. There must be a definitely ascertainable line of demarcation between these two juris-

dictions if either law is to be capable of practical application and enforcement. Drawing that line at the unloading pen is certainly a convenient and practical method of determining the jurisdiction of each agency. It is the point at which the line has been drawn by every interest for the last fourteen years and during this period there has been no difficulty whatsoever. The order of the Commission will destroy this certainty and will substitute for it doubt and uncertainty with respect to many shipments delivered at the stockyard.

The question of whether or not the yardage charges of of the Yards Company will apply to any shipment must necessarily be left, under the Commission's order, to the determination of individuals who will not be qualified to make such determination, since close questions of fact and law will be involved in each case. The service subject to the Commission's jurisdiction and that subject to the jurisdiction of the Secretary will be incapable of practical ascertainment. Such a condition is not fair to appellants or the Yards Company, and certainly is not conducive to an exact understanding by the Secretary and by the Commission on the subject of the jurisdiction possessed by each of them.

From all the foregoing we submit that on shipments of livestock to the stockyard, appellants' obligations terminate when the animals are deposited in the unloading pens. That this was intended by the enactment of Section 15 (5) of the Interstate Commerce Act in 1920 and the enactment of the Packers & Stockyards Act in 1921 seems clear, since it is consistent with the uniform practice which has obtained for 70 years, and with the result sought to be produced by the enactment of Section 15 (5). It is the only conclusion which accords with the language used in the two laws, and is supported by the decisions of the courts and the Commission. It is a conclusion acquiesced in by the Commis-

sion since 1906. And in this case, it is a conclusion compelled by the fact that appellants maintain their own facilities where consignees may secure the rights now sought on deliveries made at the stockyard. Since the Commission's order in this case apparently imposes upon appellants burdens and obligations in excess of those which the law requires them to assume, it must be set aside.

II.

EVEN IF THE COMMISSION HAS HELD THAT APPELLANTS HAVE OBLIGATIONS EXTENDING BEYOND THE UNLOADING PENS AT THE STOCKYARD AND WAS RIGHT IN SO HOLDING, THE ORDER IS VOID BECAUSE IT IMPOSES UPON APPELLANTS OBLIGATIONS BEYOND THOSE IMPOSED BY LAW.

In the report of the Commission it is said (R. 25):

> "Complainant's plant lies directly north of the unloading pens of the Union Stock Yards which are operated by the Union Stock Yard & Transit Company. There is a connecting subway under a public highway through which livestock are driven from the yards to the plant."

This statement of the Commission is not in accord with the record. As appears from Exhibits 1 and 18 filed with the Commission (R. 99, 133) and certified to this Court (R. 76, 77) the plant of the Hygrade Company is immediately north of the property of the Yards Company and is separated from that property by the tracks of the Chicago Junction Railway and by the proposed extension of Pershing Road or 39th Street. 39th Street, however, is not yet constructed at this point (R. 99), and consequently there is no public street intervening between the property of the Yards Company and the plant of the Hygrade Company.

The evidence is clear that while there is a tunnel under the proposed extension of 39th Street (R. 121), the Hy-

grade Company has always removed its animals from the property of the Yards Company to its own plant by the use of an elevated driveway or viaduct which extends from the property of the Yards Company over the pens and the Chicago Junction tracks to the property of the Hygrade Company (R. 120, 121). The viaduct is owned by the Yards Company and is used for all stock driven directly from the unloading chute or pen to the plant of the Hygrade Company (R. 121). The order of the Commission assailed herein prohibits the collection of the yardage charges of the Yards Company on all shipments of—

> "livestock in carloads consigned to complainant at Union Stock Yards in Chicago, in instances where delivery is taken at the unloading pens provided for such purposes."

This language confers upon the Hygrade Company the right to a delivery of livestock without the payment of yardage charges, even in cases where such animals are then removed from the property of the Yards Company by the use of the viaduct over the pens and the Chicago Junction tracks. Presumably, this is the right which the Commission intended to confer upon the Hygrade Company, as the evidence is clear that the viaduct is used on all livestock driven directly from the unloading pens to the Hygrade Company plant (R. 121), and reparation is awarded to the Hygrade Company on livestock so delivered in the past.

The evidence is equally clear, however, that livestock can be taken from the stockyard to the plant of the Hygrade Company without the use of any special facilities such as the viaduct which has been and is now used. The same Exhibits 1 and 18 show that Exchange Avenue, which is a private street within the limits of the Yards Company property, opens into Halsted Street on the east and into Racine Avenue on the west. Livestock unloaded into the stockyard can be taken away from it at either of these

points into a public street by being driven through the streets and alleys of the Yards Company.

This cannot be done on the north side of the stockyard, as Laurel Street, which is a private street of the Yards Company, only extends to the south side of the Chicago Junction tracks, which lie across the north side of the stockyard. Morgan Street, on which the Hygrade Company plant is situated, only comes as far south as the north line of 39th Street or Pershing Road extended. A delivery of livestock on the north side of the stockyard, without the use of the viaduct, would therefore require the use of property not within the stockyard and which is privately owned by parties other than the Yards Company.

With respect to appellants' obligations on shipments of livestock to the stockyard, the Commission, while making no findings, apparently had the idea that if the consignee was ready to remove the livestock when it was unloaded, without receiving any stockyard service, he was entitled under the law to so remove it without charge additional to the freight rate. That was the demand made by the Hygrade Company on the hearing before the Commission (R. 123, 125, 126) and is the effect of the order made.

Even if the Commission was right in thus granting the right to remove livestock from the stockyard without additional charge, we submit that there is certainly nothing in the law which confers upon a consignee the right, in removing such livestock, to the use of costly, extraordinary facilities which are not necessary to the mere right of free removal but are used only to serve the convenience of consignees. The Hygrade Company did not take the position that it was entitled to the use of such facilities as a part of such free egress, and we know of no legal requirement that they be furnished. Even in *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128, the decision in which was freely quoted by the Commission (R. 28, 29), no such requirement

was laid upon the carriers. And in the case at bar, an additional charge against the Hygrade Company is not prohibited if shipments of livestock consigned to it at the stockyard are put into holding pens (R. 30, 31). As extraordinary facilities, such pens are in the same class as the viaduct in question.

These circumstances demonstrate the incorrectness of the Commission's statement (R. 31) that

> "It is here demonstrated that there are no services performed after unloading for which defendants may assess charges, in instances where delivery is taken at the unloading pens."

This matter was referred to in the dissent from the Commission's report, where it was correctly said (R. 35):

> "Among the many facilities furnished by the stockyards company is an elevated driveway through which complainant's livestock may be and is driven directly to its plant * * *. It is for the use of this and other facilities of the stockyards company that the charges complained of are assessed."

It may be conceded that allowing the Hygrade Company free egress from the stockyard to Halsted Street or Racine Avenue will not be so convenient as egress through the use of the viaduct. Animals removed through Halsted Street or Racine Avenue would have to be driven or trucked considerable distances through public streets. But the convenience of the Hygrade Company cannot be made the measure of appellants' obligations. In *E. Kahn's Sons Co.* v. *B. & O. R. Co.*, 192 I. C. C. 705, and *Adolph Gobel Inc.* v. *B. & O. R. Co.*, 200 I. C. C. 606, the same sort of free egress was held by the Commission to be sufficient. And at stations on their own lines appellants are certainly not required to furnish consignees of livestock anything more than the mere right to remove the animals.

The extra-legal right conferred upon the Hygrade Company by the order here attacked is of substantial import-

ance to appellants. If it is to be assumed that appellants are under some legal obligation to furnish free egress on shipments of livestock consigned to the Hygrade Company at the stockyard, and coming within the terms of the order here attacked, they will be required to furnish this egress by the use of property belonging to the Yards Company. The Yards Company will naturally require the payment to it of some compensation for such use of its property, and the amount of that compensation will necessarily be determined by the character of the facilities which it is necessary to devote to the use. It is quite apparent that the charge to appellants for the use of stockyard streets and alleys in order to permit free egress of livestock to Halsted Street or Racine Avenue would be considerably less than the charge for using not only those streets and alleys but also a special facility such as the viaduct now used by the Hygrade Company. Thus, the right conferred upon the Hygrade Company by the order will be a real source of expense to appellants additional to that which they should sustain even under the Commission's view of the law.

It has never been contended in this case, or in any other case so far as we know, that a consignee is entitled to more than the right to remove his property from railroad premises without charge additional to the freight rate. No argument has been made that in order to make such removal more convenient to consignees, a railroad is required to furnish special facilities which are not necessary to the right of free removal but only make it more convenient to consignees. Even if the construction which we assume the Commission has placed upon the law is correct, we submit that the order, in conferring the right of free egress upon the Hygrade Company in designated cases, should have limited the right and should not, as it does, permit the free use by the Hygrade Company of an extraordinary facility such as the viaduct now used by it. Since the Com-

mission has not so limited the right conferred upon the Hygrade Company, its order herein imposes upon appellants obligations which are not imposed by law, even under the Commission's construction of that law. For this reason, if for no other, the order should be set aside. *United States* v. *New River Co.*, 265 U. S. 533, 540; *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, 547; *Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U. S. 452, 471.

III.

THE ORDER AND REPORT OF THE COMMISSION ARE SO INDEFINITE AND UNCERTAIN AND SO LACKING IN ESSENTIAL AND BASIC FINDINGS AS TO BE VOID.

It is well settled that if the order attacked herein is not so definite and certain as to preclude misapprehension, it will be set aside. The rule on this subject was laid down by this Court in *Illinois Central R. Co.* v. *Public Utilities Commission*, 245 U. S. 493, in which case the Commission undertook to prescribe rates for intrastate application. This Court set aside the order of the Commission because of its uncertainty, saying at page 510:

> "We conclude that the uncertainty in this order is such as to render it inoperative and of no effect as to the intrastate rates established and maintained under a law of the State, and therefore that the suits by the carriers were rightly dismissed on the merits."

The same conclusion was reached in *Interstate Commerce Commission* v. *L. & N. R. Co.*, 73 Fed. 409, 415; *Farmers Loan & Trust Company* v. *Northern Pacific R. Co.*, 83 Fed. 249, 252, 253; *United States* v. *Roberts & Oakes*, 1 Fed. Supp. 797, 799; and *American Express Company* v. *Caldwell*, 244 U. S. 617, 627. The Commission itself has recognized its obligations in this respect in *Kiser Company*

v. *Carriers,* 17 I. C. C. 430, where it was held, at page 442, that an order of the Commission must be specific and definite if it is to be enforceable under the law.

Nor can the courts correct an order which is subject to this defect. In *Interstate Commerce Commission* v. *D. L. & W. R. Co.,* 64 Fed. 723, the Court said at page 723:

> "The court cannot substitute, for an order actually made, one such as the commission might or should have made, or such as the commission intended to, but failed to, make."

In *D. G. H. & M. R. Co.* v. *Commission,* 74 Fed. 803, it was held (page 841) that there was no power in the Circuit Court to modify or change the order of the Commission. To the same effect are the decisions in *Chestnut Ridge Railway Company* v. *United States,* 248 Fed. 791, 802; *Farmers Loan & Trust Company* v. *Northern Pacific Ry. Co.,* 83 Fed. 249, 253; *United States* v. *Roberts and Oake,* 1 Fed. Supp. 797; and *Florida* v. *United States,* 282 U. S. 194, 215.

It is equally certain that if an order of the Commission is to be sustained it must be supported by basic or essential findings. In *Florida* v. *United States,* 282 U. S. 194, this Court set aside an order of the Commission because of the lack of findings required to support the Commission's order. This Court said at page 215:

> "In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported."

The foregoing rule has been lately reaffirmed by this Court in *United States, et al.* v. *Baltimore & Ohio R. Co., et al.,* Number 221, October Term, 1934, decided January 7, 1935. In that case, the decision of the lower court setting aside an order of the Commission was affirmed. Dealing

with the power of the Commission to require specified changes in locomotive equipment in order to eliminate unnecessary peril, this Court said:

> "The power to make the determination whether the proposed device or change is so required, vests in the Commission. But its finding to that effect is essential to the exercise of authority to promulgate the rule * * *."

Pointing out that, in the case presented, the lack of findings by the Commission left the basis of the order to inference, this Court concluded:

> "It is true that formal and precise findings are not required, under Sec. 14 (1) of the Interstate Commerce Act, which declares that the report 'shall state the conclusions of the Commission together with its decision' * * *. But section 14 (1) does not remove the necessity of making, where orders are subject to judicial review, quasi-jurisdictional findings essential to their constitutional or statutory validity."

The rules prescribed in the foregoing cases have application to the case at bar. In this case, there were presented to the Commission for determination, among other issues, the question whether any of appellants' rates or practices were unreasonable or otherwise in violation of the law; the rights and obligations of appellants under Section 15 (5) of the Interstate Commerce Act on shipments of livestock consigned to the Hygrade Company at the stockyard; the question of jurisdiction, as between the Commission and the Secretary of Agriculture, over the yardage charges of the Yards Company; the question whether or not the Yards Company was acting as a common carrier in performing the services for which it collected the yardage charges condemned by the Commission; and the question whether the Yards Company, in collecting the yardage charges condemned by the Commission, was acting in its own behalf or as the agent of appellants. The determination of all these issues was essential to the entry of any valid order;

yet the Commission made no finding with respect to any of them. Even in presenting our other argument in this case, we have been compelled to assume the effect of the Commission's order.

The conclusions of the Commission on these issues may, perhaps, be inferred from what it did, but such inferences are not sufficient to support the order. Thus, it may be inferred that the collection of the yardage charges involved constituted some violation of law by appellants, since the further collection of those charges is prohibited; but nowhere in the report and order is there any finding to that effect or a statement of what law was violated. The lower court, apparently recognizing the necessity of some finding on the subject, assumed that the so-called practice condemned by the Commission had been found to be unreasonable, for it said (R. 57) that the Commission—

> "has been given jurisdiction over unreasonable practices of carriers engaged in interstate transportation."

But this was pure assumption by the lower court, for there is no finding or statement by the Commission that the "practice" condemned by it is or was unreasonable. The practice of collecting the yardage charges was alleged by the Hygrade Company (R. 23) to be unreasonable, in violation of Section 1 of the Interstate Commerce Act, and the charges were alleged to have been collected without proper tariff authority in violation of Section 6, and to have been improperly collected from the Hygrade Company in violation of Section 15 (R. 21). Certainly, a finding by the Commission that one or more of these sections of the law had been violated by the collection of the charges was a prerequisite to an order condemning their collection. Without such a finding, the Commission had no power to enter the order. Under Section 15 (1) of the Interstate Commerce Act, the Commission has power to prohibit a practice, if it is of opinion that such practice is "unjust or un-

reasonable or unjustly discriminatory or unduly preferential or prejudicial," or otherwise in violation of any provision of the Act. In this case the Commission has not said that the practice condemned by it violates the law in any of the respects named. The Commission did say (R. 31):

> "It is here demonstrated that there are no services performed after unloading for which defendants may assess charges, in instances where delivery is taken at the unloading pens."

This statement is an error in fact, as we have already shown. And in any case it is not such a finding with respect to the yardage charges as gives the Commission power to prohibit the collection of those charges.

It may be inferred that the Commission made some determination of appellants' obligations under Section 15 (5) of the Act, but there is no finding or statement from which that determination may be ascertained. With respect to this paragraph of the law, the Commission only said (R. 28) that under it—

> "no extra charge may be made for any portion of the necessary service of delivery into suitable pens, and consignees are entitled to delivery at pens suitable for proper delivery without charge for the mere placement therein of the livestock."

This statement could not refer to the yardage charges, as they have never been made for the placing of livestock into suitable pens at the stockyard. The charge made for placing animals into suitable pens is the unloading charge, which is now and always has been paid to the Yards Company by appellants and not by consignees, and the report states that the unloading pens are suitable. Certainly, the report and order do not constitute a determination of the time when appellants' transportation obligations under Section 15 (5) of the Act end on shipments of livestock consigned to the Hygrade Company at the stockyard. The report states (R. 29) that yardage charges may be assessed

against consignees if advantage is not taken of a reasonable opportunity to obtain prompt delivery, and that what constitutes a reasonable opportunity may be determined from the circumstances at particular yards.

The "reasonable opportunity" thus stated is not prescribed definitely, so that in all cases, the employees who unload livestock at the stockyard will be required to guess whether each shipment is or is not properly subject to the yardage charges. This uncertainty is aggravated by the finding in the report (R. 31) that

> "livestock, in carloads, consigned to complainant at the Union Stock Yards was not and is not subject to yardage charges in instances where delivery was or is taken at the unloading pens."

This finding is carried into the order, which prohibits the collection of the charge if the Hygrade Company takes delivery of the livestock at the unloading pens (R. 37, 38). This requirement would argue no "reasonable opportunity" to take delivery, unless it be inferred that the length of time the animals stay in the unloading pens is such opportunity. As a result of the Commission's failure to make suitable findings, the matter of appellants' obligations under Section 15 (5) is left in doubt. Appellants cannot determine to what extent they are liable as common carriers; where the Commission's jurisdiction ends and that of the Secretary of Agriculture attaches, or to what extent, if any, they are or may be liable for the actions of the Yards Company.

It may be inferred that the Commission held it had jurisdiction to some extent over the yardage charges of the Yards Company, since it has made an order with respect to them. But nowhere in the report and order is there any finding to this effect, nor any language from which such a finding might be constructed. There is no statement or finding that the charges, the collection of which is prohibited by the order, are charges for a transportation serv-

ice performed by the Yards Company, appellants, or both of them, or that the service itself is a transportation service performed by the Yards Company as a common carrier. Also, there is no reference whatsoever to any jurisdiction over the yardage charges, which may be possessed by the Secretary of Agriculture under the Packers & Stockyards Act, 1921. The point is of some importance, for the Secretary now has under investigation the very yardage charges the collection of which has been prohibited by the Commission in the order here attacked (R. 152). If he has the jurisdiction which he is asserting and exercising, the Commission had no power to make the order which it did make.

In order that it might sustain the Commission's order, the lower court was compelled to assume that the Commission had definitely determined its jurisdiction over the yardage charges dealt with in its order, for the lower court said (R. 60, 61):

> "We think the Commission properly ruled that Section 15 (5) of the Act to Regulate Commerce did not limit its jurisdiction over terminals and terminal facilities of the line haul carriers and that its jurisdiction extended as provided for in paragraph 3, Section 1 of the Act."

It is certain that the Commission should have made a definite finding with respect to this point, but it is equally certain that it did not make the "ruling" attributed to it by the lower court, except in so far as it may be inferred from the order.

The complaint filed with the Commission (R. 18) alleged that the Yards Company was a common carrier engaged in the transportation of livestock subject to the Interstate Commerce Act. In its answer filed with the Commission (Part of Exhibit 1, certified to this Court), the Yards Company specifically denied that it was such a common carrier and denied that its activities or charges were

subject to regulation by the Commission. Thus, the legal status of the Yards Company was a matter definitely presented for consideration and determination. It may be inferred that the Commission thought the Yards Company was a common carrier subject to its jurisdiction, since the order is directed to the Yards Company, but there is no finding or discussion on the point in the Commission's report. Nor is there any finding as to the status of the Yards Company in relation to appellants, or any language referring to the matter.

This Court, under the circumstances then obtaining, held the Yards Company to be a common carrier in *United States* v. *Union Stock Yard & Transit Company*, 226 U. S. 286. The Commission reached the same conclusion in *Chicago Live Stock Exchange* v. *A. T. & S. F. Ry.*, 52 I. C. C. 209, 58 I. C. C. 164. Since those decisions, the Yards Company has entirely divested itself of any interest, direct or indirect, in any railroad company, under authority of the Commission's decision in the *Chicago Junction Case*, 71 I. C. C. 631. It was, therefore, necessary for the Commission to re-examine the matter in view of the changed situation, since the facts now indicate that the Yards Company is not subject to the Commission's jurisdiction.

The only thing said in the report with respect to the status of the stockyard is that (R. 26):

> "The Union Stock Yards are public yards served over the rails of the Chicago Junction by the individual line haul carriers bringing livestock to Chicago and they are the livestock terminal at Chicago for all these carriers. They provide for the carriers the means of making the deliveries of livestock to consignees at these public yards which they are under obligation to make."

This statement referring to the facilities owned by the Yards Company is not a finding as to the legal status of the Yards Company itself in performing the services for which the prohibited yardage charges are collected. Even

the lower court agreed there was no finding on the point by the Commission (R. 58). The matter is of great practical importance, for the reason that the charges in question have been and are collected by the Yards Company under its tariffs filed with the Secretary of Agriculture (R. 152). Appellants have never collected them or received any part of them from the Yards Company.

Appellants are concededly common carriers subject to the Commission's jurisdiction. If the Yards Company, in collecting the charges dealt with in the Commission's order, is not a common carrier subject to the Commission's jurisdiction, the order should not have been directed to it. Nor could the order have been made against appellants in such case without a finding that the Yards Company is the agent of appellants, and certainly there is no such finding. As a matter of law, the order must be set aside if the Yards Company is not a common carrier, without regard to any other point. The same finding as to the agency of the Yards Company would be necessary, if appellants are to be bound by the order, even if the Yards Company is a common carrier. But if the Yards Company is a common carrier acting on its own behalf, the order should not have been directed to appellants at all, since they do not collect or receive the charges or have any control over them.

Recognizing the importance of the matter, the lower court dealt with it at some length, but did not make it any clearer. It said (R. 58):

> "The order is not indefinite in determining whether the Yards Company is a common carrier * * *. It was not essential to make such a finding here to support the order granted. The Commission found that the Yards Company was the livestock terminal for all the complaining carriers. The Yards Company provided for the carriers the means of making deliveries of livestock to the consignee at this public yard. But this delivery was a part of the transportation and of the duty of the carrier."

Again, the lower court said (R. 59):

> "The evidence is clear that these yardage charges are imposed, collected, and retained by the Yards Company and are for services rendered to the complainants in the performance of their transportation duties. It is proper that the order of the Commission should be directed against the Yards Company."

From the foregoing it might be concluded that the lower court thought appellants had the obligation of making the delivery to which reference is made, and that the order was properly directed to the Yards Company because it owned the facilities used by appellants in making such delivery. But the law is clear that the mere ownership of facilities which may be and are used in interstate transportation does not make the owner a common carrier subject to the Commission's jurisdiction. *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, 443, 444; *United States* v. *Interstate Commerce Commission*, 265 U. S. 292, 295, 296; *Detroit, etc. Bridge Co.* v. *Corporation, etc. Board*, No. 272 October Term, 1934, decided January 14, 1935. Nor would the performance by the Yards Company of common carrier services for appellants as their agent subject it to the Commission's jurisdiction. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42; *A. T. & S. F. Ry.* v. *Kansas City Stock Yards Co.*, 33 I. C. C. 92, 98; *Keystone Elevator & Warehouse Co.* v. *Director General*, 73 I. C. C. 273, 274.

The lower court also said (R. 59) that after the Yards Company was declared to be a common carrier in *United States* v. *Union Stock Yard & Transit Company*, 226 U. S. 286, it made changes in the terms of its leases, but that it was unnecessary to determine whether or not it changed its position as a common carrier, since in the performance of this duty it rendered transportation services. From this statement it might be concluded that the lower court thought the Yards Company performs the services in question as an independent common carrier; a holding at variance with that previously made.

Again, the lower court said (R. 59):

> "The Yards Company might well have been found to be a common carrier even though it be an agent of the complainants in their transportation service."

From this it might be concluded that the lower court thought the Yards Company was the agent of appellants in making the collection prohibited by the order, a holding still different from the two suggested by other parts of the lower court's opinion.

It is obvious that the lower court realized the insufficiencies of the Commission's report in so far as this matter is concerned, and endeavored to supply the findings which the Commission should have made. It had no authority to do so and did not, in fact, make the situation any better so far as appellants are concerned. Even the order made by the Commission affords no ground for any certain action.

The Commission's feeling that the Yards Company acted as a common carrier in its own behalf may be inferred from the fact that the order is directed to the Yards Company. But the order is also directed to appellants, which are also said to be liable for reparation, and this would argue some liability on appellants for what the Yards Company has done. In *Chicago Live Stock Exchange* v. *A. T. & S. F. Ry. Co.*, 52 I. C. C. 209, 222, the Commission held that a determination of the common-carrier status of the Yards Company was necessary to a decision in the case. On rehearing of the same case, 58 I. C. C. 164, 167, it pointed out that because of the Yards Company's status as a common carrier its charges against the railroads would be subject to the Commission's approval. A determination of the issue was equally necessary in the case at bar.

The failure of the Commission to determine, through appropriate findings, the issues submitted to it, has resulted in a report and order so indefinite that appellants could not

know what to do in order to comply with the order. Appellants cannot definitely determine what their obligations are; when their duties as common carriers are discharged; at what point in the transportation of livestock to public stockyards the jurisdiction of the Commission ends and that of the Secretary of Agriculture attaches. They cannot know of what violation of law the Commission has found them guilty. The only definite finding and requirement is that the yardage charges may not be collected from the Hygrade Company in instances where delivery is taken at the unloading pens. This prohibition runs against appellants, with nothing to show why appellants should stop collecting charges which they never have collected and do not propose to collect.

While the Yards Company does collect the prohibited charges, their collection from the Hygrade Company is the only action prohibited. The Yards Company has no way of knowing whether or not it may continue the collection of its charges from appellants. To do so would require the assumption that the Yards Company was the agent of appellants or was renting to them facilities which they were required to furnish as common carriers, but was not acting as a common carrier in its own behalf in performing the service for which the charge is collected.

Nor can appellants determine their obligations. If they are to pay something to the Yards Company for the use of its facilities or for its services on the theory that under some circumstances they have an obligation beyond the unloading pen, it is necessary that they know the status of the Yards Company. If it is to be considered as an independent common carrier in furnishing such facilities and services, it must file its charges with the Commission, and appellants would then pay them through the filing of absorption tariffs with the Commission. That is what is done with the loading and unloading charges of the Yards

Company, and the Commission has declined to permit the Yards Company to cancel its tariff containing those charges. *Chicago Live Stock Exchange* v. *A. T. & S. F. Ry., et al.*, 52 I. C. C. 209, 222, 223.

On the other hand, if the Yards Company is to be considered as not being an independent common carrier, any payment required to be made by appellants could be made under contract. The lower court suggested (R. 58) that the matter could be handled through a readjustment of divisions, assuming a finding by the Commission that the Yards Company was acting as a common carrier and entirely overlooking the conceded fact that appellants and the Yards Company do not join in the publication of joint rates.

The lower court also suggested (R. 58) that the matter of payments to be made by appellants for their use of the Yards Company facilities had been left by the Commission to the discretion of the carriers. The statement assumes such an obligation on appellants, and also overlooks the fact that the matter is not one which the law necessarily leaves to the discretion of the parties. As we pointed out, under circumstances which may perhaps obtain, the parties would have to handle any payment made by appellants in accordance with the requirements of the Interstate Commerce Act.

We submit that, for the reasons given, the order is void. The Commission has not only failed to state the grounds for its determination, *B. L. S. & W. R. Co.* v. *United States*, 282 U. S. 74, 86, but has failed to make those quasi-jurisdictional determinations which are essential to the validity of the order. The result is that appellants are left without those guides that they must have if they are to know what they should do in order to comply with the order. To put them in this position is neither fair nor just.

Conclusion.

We submit that in this case every consideration requires that the Commission's order should be set aside. By apparently concluding that appellants have some obligation beyond the unloading pens, in connection with the transportation of ordinary livestock in carloads to public stockyards, the Commission has misconceived the effect of statutory enactments, has given no effect to a practice which has established appellants' obligations, and has reached conclusions not supported by even its own decisions. It has apparently undertaken to establish a rule of law not justified by the statute upon which it apparently relies and certainly not supported by the only decision of this Court cited in the report. The order, if it becomes effective, will upset an orderly and efficient method of doing business which has grown up as a result of many years practice; will create doubt and uncertainty with respect to the obligations of appellants and the Yards Company; will impose upon appellants obligations far beyond their obligations as common carriers, and will confer upon the Hygrade Company and other consignees rights to which they are not entitled.

We submit that there is no justification for such a result. While the decision of the Commission, as such, is reflected in the majority report, it is nevertheless important that five Commissioners, only one less than the majority, vigorously dissented. It seems to us that the dissenting opinion correctly states the law.

In addition, the report of the Commission is so lacking in those findings which this Court has held to be necessary that in presenting our argument we have been compelled to assume the conclusions which the Commission may have reached as a foundation for its order. This is not in ac-

cordance with the law nor is it fair to appellants. The law requires that the Commission make those findings from which it may be known what it has done, and surely appellants are entitled to so much. The failure of the Commission in this respect has created an impossible situation so far as appellants and the Yards Company are concerned; as if compliance with the Commission's order be required, appellants do not know what action they should take.

We submit that the decree of the District Court should be reversed and that the order of the Commission should be set aside.

Respectfully submitted,

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